

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DONNA CURLING, ET AL.,	:	
	:	
PLAINTIFFS,	:	
vs.	:	DOCKET NUMBER
	:	1:17-CV-2989-AT
BRAD RAFFENSPERGER, ET AL.,	:	
	:	
DEFENDANTS.	:	

TRANSCRIPT OF TELEPHONE CONFERENCE PROCEEDINGS

BEFORE THE HONORABLE AMY TOTENBERG

UNITED STATES DISTRICT JUDGE

SEPTEMBER 28, 2020

11:04 A.M.

REDACTED

MECHANICAL STENOGRAPHY OF PROCEEDINGS AND COMPUTER-AIDED

TRANSCRIPT PRODUCED BY:

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UNITED STATES DISTRICT COURT
OFFICIAL CERTIFIED TRANSCRIPT

A P P E A R A N C E S O F C O U N S E L

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P R O C E E D I N G S

(Atlanta, Fulton County, Georgia; September 28, 2020.)

COURTROOM DEPUTY CLERK: Morning, Judge.

THE COURT: How are you? I had a little trouble getting in. I'm sorry.

COURTROOM DEPUTY CLERK: No problem.

I think we have representatives for everybody here, if you would like me to call the case.

THE COURT: Sure. Thank you very much.

COURTROOM DEPUTY CLERK: All right. Morning, everyone. We are here for the telephone conference in the case of Curling vs. Raffensperger, Civil Action Number 17-CV-2989.

Judge, this morning representing the State of Georgia, we have Mr. Russo, Mr. Miller, Mr. Tyson, Mr. Denton, and Mr. Jacoutot.

For the Curling plaintiffs, we have Mr. David Cross.

For the Coalition, we have Mr. Cary Ichter, Mr. Bruce Brown, and Mr. Robert McGuire.

And for Fulton County, we have Ms. Cheryl Ringer on the line.

THE COURT: Thank you very much. Morning, Counsel. Thank you for making --

MR. MILLER: Morning, Judge.

THE COURT: Good morning. Thank you for making yourselves so quickly available. I am most appreciative.

1 You know, obviously I didn't know until I read the
2 note -- the notice filed on -- on the docket about some of the
3 issues that had arisen, I gather, by Friday but maybe
4 beforehand as to the logic and accuracy testing of the ballot.
5 And, frankly, because I have been working on the order, I
6 didn't see it until Sunday morning.

7 So I had some follow-up questions because this
8 information in some ways even just in terms of whatever the
9 accuracy of what I'm saying or considering here has been
10 impacted. And I just didn't feel that it was appropriate for
11 me to issue something until I understood what was -- where we
12 were at and also because of some of it potentially -- the
13 potential issues I'm looking at or the issues that I am looking
14 at.

15 So I asked whether Mr. Coomer could be available on
16 the phone. Is Mr. Coomer available?

17 I don't mean to directly question him this second,
18 but I just want to know whether he is present.

19 DR. COOMER: This is Dr. Coomer, and I am present.

20 THE COURT: I'm sorry. Thank you, Doctor.

21 So just so that I know what we're talking about is
22 that the open election that has 20 candidates for a Senate --
23 United States Senate position is there is some sort of ballot
24 configuration issue that was affecting the ballots statewide --
25 design statewide.

1 Is that a correct statement?

2 MR. TYSON: Your Honor, this is Bryan Tyson. Yes,
3 that is a correct statement.

4 What we want to discuss this morning is this is
5 ultimately a very minor issue that has been kind of blown up
6 based on plaintiffs' counsel's assumptions about this.

7 THE COURT: All right.

8 MR. TYSON: This is a -- so I'm sorry. I don't mean
9 to -- I didn't know how you wanted to proceed, but I'm prepared
10 to discuss --

11 THE COURT: Well, you can go ahead and present it as
12 you -- you know, describe it as you see fit. And then we can
13 ask questions. That is why I said I wasn't going to plunge
14 into asking questions because I wanted just to -- I wanted you
15 to summarize and tell me what is going on from your
16 perspective. And then I could --

17 MR. TYSON: Thank you, Your Honor.

18 THE COURT: And if it is easier at some point for
19 Dr. Coomer to present that, then that is fine too.

20 MR. TYSON: Yes, Your Honor. I think it might make
21 sense. I can kind of explain the initial issues. And then we
22 can -- Dr. Coomer can answer some more technical questions.

23 And, obviously, given the openings we are hearing, if
24 we get too technical, there may be some intellectual property
25 issues or State election process issues that are arising.

1 THE COURT: All right.

2 MR. TYSON: Where we are --

3 THE COURT: Let me just say if there are we'll just
4 leave those until the end. And while I had not initially
5 anticipated we would be in a public hearing and just scheduled
6 it to get myself up to date, I really didn't have any choice in
7 terms of that.

8 I mean, it is still a public matter. That is where
9 we are. But if it is something that is covered by intellectual
10 property or otherwise it is so confidential that we need to
11 deal with it in private, then we'll deal with it at the end of
12 the meeting. Okay?

13 MR. TYSON: Thank you, Your Honor. That sounds
14 great.

15 All right. So, Your Honor, where we are is, I think,
16 again a situation where the Coalition plaintiffs have jumped to
17 conclusions not fully understanding what is happening and they
18 are trying to make a mountain out of what really is a mole hill
19 that is not merely as big a deal as they are alleging.

20 And, initially, just for the purposes of the record
21 to preserve objections, we don't believe this evidence is
22 relevant to the issues in the complaint or this should be
23 addressed or needs to be addressed through a hearing. But we
24 want to be responsive to the Court's request.

25 So everything we're talking about today stems from a

1 basic decision of election administration made by the
2 Secretary's office. As you referenced already, the U.S. Senate
3 special election has 20 candidates in it. And so in terms of
4 ballot design, we all know ballot design impacts voter
5 behavior. And so we had for the Votomatic the butterfly ballot
6 in Palm Beach County in 2000 and we had a U.S. Senate race in
7 Florida in 2018 on a hand-marked ballot where ballot design led
8 to some undervotes.

9 And so given the nature of the BMDs, they primarily
10 display candidates in a single column list. If we use that
11 single column list to display candidate names, then a number of
12 candidates would not appear -- if we had to do multiple pages
13 or scrolling down, they wouldn't appear on the first page. And
14 the candidates who would not appear on the first page, if we
15 had a scroll or a second page of candidates, include Mr.
16 Lieberman, Senator Loeffler, Mr. Tarver, and Reverend Warnock.
17 So a number of significant candidates would not be listed on
18 the front page.

19 So in order to accommodate the candidates and
20 administer the election, the Secretary's office decided to
21 ensure that all the candidate names appeared on the first kind
22 of single screen for the ballot-marking devices. That required
23 two columns to be displayed, which is not a typical setup.
24 And, again, this is not a typical election because there are so
25 many candidates.

1 So everything that we're going to discuss today stems
2 from that decision. And if there was not a scrolling down or a
3 paging over, there would not be a question.

4 Dominion assisted in the programming of the databases
5 so they could be displayed in two columns. And so when
6 counties began their logic and accuracy testing, logic and
7 accuracy testing did what it was supposed to do. It discovered
8 this very minor issue for a very limited subset of voters based
9 on particular behavior that one time would keep the second
10 column of candidates from showing up.

11 And so I want to let Dr. Coomer kind of talk through
12 some more of the details there. But there is no impact on
13 absentee ballots, to be abundantly clear. The databases
14 correctly include all candidates. There is no issues there.
15 This has nothing to do with the scanners. And there is time to
16 address this before logic and accuracy is complete.

17 There's two stages to logic and accuracy testing.
18 There is a limited subgroup for the early voting machines that
19 have to be deployed by October 12th. And then the logic and
20 accuracy and programming for election day machines can continue
21 after that.

22 THE COURT: I'm sorry. Just a second. Just go back
23 a second. Go through your calendar again. I realize that the
24 absentee ballots were not affected. But you were going through
25 the calendar, and I missed something.

1 MR. TYSON: Certainly, Your Honor. So the counties
2 had -- most of the counties who would be doing logic and
3 accuracy have started this week. This was an issue that was
4 discovered on Thursday. So it is a relatively new thing.
5 Again, a minor issue in two counties that it was discovered.

6 Early voting begins on October 12th. And so the
7 logic and accuracy testing and programming for the machines
8 that will be used in early voting -- we still have two weeks to
9 complete that process. So there's time to address that.

10 The election day machines can continue to be
11 programmed after early voting begins. And so that process can
12 continue up until it is time for equipment deployment when we
13 get to the weekend before the election. So there's still time
14 for us to address and take care of the display issue going
15 forward.

16 But I think it is also important to remember kind of
17 again where we are. The plaintiffs are flagging this as kind
18 of some apocalyptic scenario on social media, and it is not.
19 This is a very minor issue. And this is an issue with the
20 display of the 20-candidate race, and that is it. This is not
21 anything bigger than that.

22 And to have the plaintiffs continue to jump in based
23 on assumptions, file this at 11:00 P.M. on a Friday night,
24 make a number of allegations in front of you on Monday, Your
25 Honor, this is -- we have -- their experts have already said

1 that Georgians should not have confidence in the elections.
2 And this is an example where this is a minor issue being blown
3 up to something major. And we would just urge the Court that
4 this is not the right time or place to be dealing with, again,
5 kind of more ambush evidence being brought in.

6 But that being said, Your Honor, Dr. Coomer can --

7 THE COURT: I'm sorry? Hello.

8 MR. TYSON: I'm sorry, Your Honor. I believe I was
9 muted accidentally.

10 THE COURT: Okay.

11 MR. TYSON: So that covers my kind of introduction,
12 Your Honor. So I think maybe Dr. Coomer can cover some of the
13 specifics on what has been done and what is being done as we
14 work to address this minor issue.

15 THE COURT: All right. So let me ask one more
16 question before you turn it over to Dr. Coomer. All right?
17 And it may be that he is better to answer this.

18 But the ballot styles that are getting transferred
19 and checked, are they -- basically when we talked about
20 replacement of ballots -- the whole ballot had to be rebuilt
21 and replaced, I'm just trying to understand where and when is
22 that occurring.

23 MR. TYSON: Yes, Your Honor. Dr. Coomer can cover
24 that. This was first discovered -- the initial issue was we
25 believed that a database fix was necessary. I believe we have

1 now determined that there is a simpler solution than that and
2 no databases need to be changed or affected.

3 But I'll let Dr. Coomer speak to that. All the
4 machines need to be touched anyway during logic and accuracy.
5 So they are already going to be touched anyway in terms of the
6 normal programming process.

7 THE COURT: Okay. Go ahead, Dr. Coomer.

8 DR. COOMER: Thank you, Your Honor.

9 Just to reiterate what Mr. Tyson just covered, so
10 during the logic and accuracy testing, a very specific pattern
11 was identified. It is a very rare occurrence. But as
12 described under a certain pattern in a certain circumstance,
13 that second column of candidates in this two-column contest
14 will fail to display on the first viewing.

15 Once the voter views other parts of the ballot and
16 comes back to that contest, those candidates will reappear on
17 the screen. This happens only once for one voter during a
18 complete machine cycle. So it is not a systemic issue. It is
19 a very specific pattern that leads to this.

20 You know, we did some analysis on the election
21 project itself to see if we could address the issue through a
22 new database project. What we discovered is that the
23 underlying issue is the way that the ICX is communicating with
24 the underlying Android operating system.

25 And then we had to identify a de minimus software

1 change that addresses this issue. We have made that change
2 internally. We have tested that change. We believe it is a de
3 minimis change, and we have submitted that de minimis change
4 under the certification process to the voting system test
5 laboratory, Pro V&V, for verification and validation.

6 THE COURT: So is that what you normally do? That
7 you -- when you have a ballot prepared that you are -- or
8 because you've had to change the software that you are saying
9 that you are submitting it to Pro V&V?

10 DR. COOMER: Yeah. Because it is a de minimis
11 software, under the certification guidelines, this is the
12 process to accomplish that.

13 THE COURT: So the software change -- without getting
14 into all the details -- probably you're going to have to repeat
15 something again -- you made a software change that would allow
16 the -- there was some sort of problem in the software
17 beforehand that was basically making some ballots disappear --
18 the second page?

19 DR. COOMER: Yes. And it is not disappear. They
20 failed to render in very certain rare circumstances. And this
21 change fully mitigates that across the entire project, without
22 any changes necessary to the project itself. So that, you
23 know, guarantees that there is, you know, no related issues for
24 any of the absentee ballots that have already been sent out.

25 This change -- again, this de minimis change if

1 applied to the ICX would then allow in any instance for the
2 complete rendering of that contest in the two-column format,
3 which then preserves, you know, the voter use and not have to
4 have the voter scroll or go to a second page to view all of the
5 candidates.

6 THE COURT: So let me just kind of roll back to the
7 most basic of questions. All right? And my apologies. But
8 right now, I mean, this still was -- this is going to render a
9 change in the ballot style or not, or does this just make it
10 more reliable?

11 DR. COOMER: Yeah. It doesn't make any changes to
12 the ballot style or the underlying election definition. It is
13 simply to address the rendering issue where under certain
14 circumstance the second column would not appear on the first
15 view.

16 THE COURT: And just to make sure that I haven't
17 misunderstood something, are ballot styles -- all ballot styles
18 for a county basically put -- I'm just trying to understand
19 because you can end up having -- swapping out machines.

20 Is this -- what are we talking about in terms of the
21 ballot styles only being in -- located in one precinct or is it
22 in the county when you are doing the testing?

23 I'm really just trying to understand to make sure I'm
24 concretely getting it.

25 DR. COOMER: Yeah. So the --

1 THE COURT: The testing -- where is the software --
2 when we get a card out of the check-in -- check-in at the polls
3 and it creates a card for you, then you are going to go over
4 and cast your vote on the ballot-marking device. Is it that
5 the software is in the cards you are bringing over? Is it the
6 software that is triggering the BMD to generate it and then in
7 turn going over to the scanner?

8 Just walk me through that so I make sure I haven't
9 misunderstood anything.

10 DR. COOMER: Yes. So the entire election definition
11 resides on the ICX itself. The only information that comes
12 through the voter activation card is essentially a ballot style
13 ID. So the machine knows what ballot to present to the viewer.
14 And then there are a couple of related security elements to
15 protect that data in transit.

16 THE COURT: Then what about the scanner -- the
17 scanner tabulator?

18 DR. COOMER: The scanner itself -- and, again, this
19 issue does not affect the scanner tabulators whatsoever. Those
20 definitions -- because, again, it is simply a display issue on
21 the ICX. It is not any of the underlying election definition.

22 The scanner tabulator has a full definition of the
23 ballots that are either in that precinct or in the early vote
24 for the whole county so that it knows how to process each
25 individual ballot style that is scanned.

1 THE COURT: Okay. But in terms of the L&A testing,
2 aren't you testing the correspondence at each stage of the
3 election? I mean, basically --

4 DR. COOMER: Yes. L&A is conducted on all pieces of
5 the equipment. So it is including the ICX, which is how this
6 issue was discovered and the scanner tabulators, whether they
7 are the precinct-based or the central count scanners.

8 THE COURT: All right. So what is the time frame
9 that you are anticipating on the review at the laboratory?

10 DR. COOMER: I don't have a definitive time line.
11 But due to, you know, the de minimis nature of this change, you
12 know, we would expect that to be conducted and finalized, you
13 know, today or tomorrow, I believe.

14 THE COURT: So --

15 MR. TYSON: Your Honor, I'm sorry. This is Bryan
16 Tyson. We have Mr. Sterling from the Secretary's office on the
17 line as well who may be able to offer some insight on timing,
18 if that is what you are looking to dig into.

19 THE COURT: Well, very briefly, yes. Go ahead.

20 MR. TYSON: Mr. Sterling, are you able to unmute
21 yourself?

22 MR. STERLING: Now I think I'm unmuted. Can y'all
23 hear me okay?

24 THE COURT: Yes.

25 MR. STERLING: Okay. Good.

1 I'm sorry, Judge. If you could repeat your question,
2 I can try to give you as definitive an answer as possible given
3 the moving nature of this.

4 THE COURT: Okay. Go ahead.

5 MR. STERLING: No. Could you repeat your question.
6 I apologize. I just want to make sure --

7 THE COURT: I'm sorry. I was asking: What is the
8 time frame -- assuming the P&V {sic} lab is through with this
9 and says this is fine and it has done it by Wednesday, what is
10 the time frame?

11 MR. STERLING: As soon as it gets done, we will get
12 the secure media to all the counties to then begin the process
13 of loading on to the BMDs.

14 What essentially we're doing is we're making it a
15 part of the L&A process. They will load this de minimis change
16 on to the ITXs directly and then load the database after they
17 test through that in a normal L&A process. So we are actually
18 just inserting one additional step --

19 THE COURT: Wait, wait, wait. You have got to --
20 Wait. Stop. Stop. We have a court reporter present.

21 MR. STERLING: Sorry.

22 THE COURT: So you are going to have to start again.
23 I'm sorry.

24 MR. STERLING: That's okay. I will talk slower. I
25 have a bad habit of doing that.

1 All right. So what we're going to do is once the Pro
2 V&V gets us the tested software done, we will take that secured
3 media and take it to each one of the counties individually.

4 Now, in normal L&A testing, they are going to have to
5 touch every ICX anyway. So the plan is to insert this as an
6 additional step at the front end for the ICX/BMD, where they
7 will take the media, load the de minimis software change on to
8 the BMD, and then cycle it through and load the database on,
9 and then do their normal L&A testing.

10 So essentially we're adding an additional step at the
11 front end of the L&A process for the BMDs. So this is a normal
12 process anyway. And Dominion is looking at sending some
13 additional staff to those counties that had already begun to
14 get them back closer to their original time line.

15 THE COURT: And how is it loaded? How --

16 MR. STERLING: Oh, it is a secure thumb drive that we
17 physically get overnighted to us from the laboratory, and then
18 we duplicate and then send out either by Sneakernet or
19 overnight delivery service to the counties.

20 THE COURT: And that is how also the database is --

21 MR. STERLING: Correct. They already have the
22 databases because there is no change to the database. So that
23 is already there.

24 THE COURT: Right. No. But I'm just asking: Is
25 that how you -- the ballot --

1 MR. STERLING: Yes.

2 THE COURT: -- the ballot design and the database
3 that you transfer to -- you sent that by the same way?

4 MR. STERLING: Yes, Your Honor.

5 THE COURT: And do all of the counties have that at
6 this juncture or only some -- they only have it for some of
7 them?

8 MR. STERLING: All of the counties have a database.

9 THE COURT: All right. And they have the county --
10 the database for just their county or for the State?

11 MR. STERLING: This is a little more technical. As I
12 understand it, they have their county style and everything
13 because each BMD will carry all the ballot styles for that
14 county.

15 MR. TYSON: Your Honor, this is Bryan Tyson. I think
16 that if you'll recall the databases that include all of the
17 statewide elections obviously are customized for each county
18 and then each ballot style for each county is in the county
19 database.

20 So those -- that is what we covered, I believe, in
21 the hearing a couple of weeks ago in terms of that process.
22 And the programming process for the BMDs is again, I think,
23 what we -- what Mr. Sterling has outlined.

24 THE COURT: All right. I mean, I'm just trying to
25 make sure I understand in the context of what we are doing here

1 where everything is at. That is fine.

2 So has -- has the software modification already been
3 sent to P&V {sic}?

4 MR. STERLING: Yes, Your Honor.

5 THE COURT: When was that sent?

6 MR. STERLING: I believe it was sent on Sunday,
7 yesterday.

8 THE COURT: So -- I'm sorry. Dr. Coomer, was it sent
9 from -- was the modification sent from Dominion's office in
10 Colorado, or was it sent from Georgia?

11 DR. COOMER: That was sent -- sorry. This is
12 Dr. Coomer. That was sent from the Dominion offices.

13 THE COURT: All right. And you have a laboratory who
14 had -- that had completely tested it at this point?

15 DR. COOMER: Yes. So this is -- this is Dr. Coomer
16 again. This is the same laboratory that did the initial
17 certification. So all we had to do was send them the de
18 minimis change. They have applied that to the certified copy
19 that they already have.

20 I did just confirm that they just did the trusted
21 build this morning. And part of that process is their review
22 of the de minimis nature. And they should have that validated,
23 again as I said, today or tomorrow at the latest.

24 THE COURT: So in terms of the logic and accuracy
25 testing, are you anticipating doing a separate test on this

1 particular functionality?

2 MR. STERLING: This is Mr. Sterling.

3 THE COURT: No. Let me ask Dr. Coomer first.

4 Is that what you are anticipating?

5 DR. COOMER: Yes. This is Dr. Coomer. Absolutely.

6 And that is actually part of the certification process because

7 they need to validate the de minimis change and the affected

8 issue. So that is part of their test plan. And I can let

9 Mr. Sterling discuss anything that the State wants to.

10 THE COURT: Go ahead, Mr. Sterling.

11 MR. STERLING: Thank you, Your Honor. As part of

12 L&A, the new software will be on there and it will be tested

13 just like the database and software were tested where this

14 issue was found and addressed so quickly. That is why we do

15 L&A testing. This is how the system is supposed to work.

16 So yes. When we add the new software, small de

17 minimis change, it will be part of the overall L&A testing of

18 each individual BMD that is deployed.

19 THE COURT: Well, the testimony -- and I don't mean

20 to in any way examine -- go beyond the scope of this. But the

21 testimony indicated that the normal standard is to test one or

22 two or three races on each of the BMDs rather than the entire

23 ballot.

24 So that is why I'm asking you about how this will

25 be -- how will this one be -- this particular software issue be

1 changed? Is it going to be the same sort of system that you
2 already are using -- that you only do some tests? I mean, if
3 you only are going to vote on -- test the Senate race on, let's
4 say, you know a fraction of the BMDs, how do you know that you
5 are -- that you caught the whole thing?

6 MR. TYSON: Your Honor, this is Bryan Tyson. I think
7 the testimony and the evidence from the hearing related to --
8 that kind of laid out the exact process for testing. And I
9 think as Dr. Coomer explained already, this is an extremely
10 rare situation to start with.

11 And so obviously the logic and accuracy testing was
12 robust enough to capture it. We expect it will be robust
13 enough to capture any other issues that would be identified as
14 we follow the process that was outlined.

15 MR. BROWN: Your Honor, this is Bruce Brown. If I
16 may respond to some of this if you --

17 THE COURT: Well, let's just make sure, Mr. Brown,
18 that they feel they have had an opportunity to present
19 everything that has happened. And then you can ask any
20 questions or address any problems.

21 MR. BROWN: Of course.

22 THE COURT: Counsel, is there more that you would
23 like to present to any of the issues raised?

24 MR. TYSON: Your Honor, this is Bryan Tyson. I don't
25 believe so. I think, again, this is -- this is just a

1 demonstration that logic and accuracy testing was robust enough
2 and caught this issue. It has been resolved, as you heard, on
3 a very, very quick time line. It is going to be resolved in
4 time to complete the process for the November election.

5 And there is no basis for us to have to change course
6 or do anything different based on this one minor issue in this
7 process. So I think that is what -- we have covered what we
8 would like to cover with you.

9 THE COURT: All right. I had one final question
10 before Mr. Brown raises anything else.

11 What then -- where was this identified in terms of
12 the L&A testing? Because you said it was some particular types
13 of ICXs where this was reflected. I don't know whether it was
14 a particular county or was it a particular precinct or what was
15 the story.

16 MR. TYSON: So, Your Honor, this is Bryan Tyson
17 again. Dr. Coomer may be able to speak more specifically. But
18 I believe what happened is there had to be a particular set of
19 voter behavior in terms of flipping back and forth through
20 races to cause the display issue to occur.

21 So it was identified in I know at least two counties.
22 But it was based on a specific kind of sequence of events you
23 had to complete. In every other situation, the Senate race
24 displayed properly.

25 Dr. Coomer may have more on that.

1 DR. COOMER: Your Honor, this is Dr. Coomer.
2 Mr. Tyson summarized that completely. I don't have any more to
3 add.

4 THE COURT: So you were seeing -- the voter was going
5 back and forth on the ballot trying to determine what he or she
6 wanted to do or consider his options?

7 DR. COOMER: Yeah. Again, it is a pattern of how the
8 ballot is displayed. And it is not -- it is not, you know,
9 just a specific model or just a specific county. It is any
10 time this double column contest is viewed in a particular
11 pattern only once through the whole machine cycle can lead to
12 this issue.

13 THE COURT: I'm sorry. Only -- what is only once?

14 DR. COOMER: That this behavior happens. So it is
15 not that -- you know, if it happened for one voter and then the
16 next voter did the exact same pattern, it wouldn't happen for
17 them. It has to do with sort of the lifetime of the machine
18 you are on. There is one particular pattern. And once that
19 happens, it fails to display properly. But then from that
20 point on, it will always display properly.

21 So that is why it is such a rare occurrence is
22 because you have to have this perfect pattern and it is only
23 once.

24 THE COURT: All right. I have a host of questions
25 about that. But I'm not going to -- I'm sure. Obviously there

1 are other different scenarios once the testing is looked at in
2 that connection. But I'm not going to -- I'm not going to go
3 there at this moment.

4 Mr. Brown, what did you want to say?

5 MR. BROWN: Yes, Your Honor. Yes, Your Honor. I
6 have a couple of things to say about this.

7 First, with respect to the screen flipping column
8 problem that the State defendants have described, that --
9 first, that is only one of three problems that we have
10 information about. So the Secretary -- so there's one problem
11 that the Secretary is disclosing. And there are two
12 undisclosed problems, even though we notified them about them
13 over the weekend. And I'll explain.

14 But, first, on the problem that they did explain,
15 Mr. Tyson's explanation for the robustness of the logic and
16 accuracy is a mammoth non sequitur. What he is saying is that,
17 because we slipped and fell and found one needle in the
18 haystack, therefore we know where all the other needles reside.

19 They have described a freakish discovery, and we
20 still don't know who found it, whether it was found by a county
21 or it was found by Dominion in their offices in Colorado or
22 Canada or wherever they are doing this, or it was found by a
23 county. You asked, but they did not disclose that.

24 But, first, the idea that the logic and accuracy
25 testing was robust is just flatly wrong. They are violating

1 state law --

2 THE COURT: All right. I mean, I understand what the
3 evidence is on that.

4 MR. BROWN: Okay.

5 THE COURT: But you said there were two other things
6 you brought to their attention.

7 MR. BROWN: Yes, Your Honor.

8 **(Unintelligible cross-talk)**

9 MR. BROWN: When we filed our notice on Friday
10 evening, we did not even know about what they are talking about
11 today. Instead, what we learned from Cherokee County is that
12 the -- when they started their logic and accuracy testing, the
13 tabulation of mail -- of hand-marked mail ballots did not work
14 at all. They would feed it in, and they would get zero votes.

15 They reported that to the Secretary of State. Hours
16 later, the Secretary sends a notice to all 159 counties saying
17 that the database was defective.

18 Then with the notice that the database was defective,
19 Your Honor, we thought it was appropriate to make the Court
20 aware of that. This is the database that is driving the
21 election -- the general election in November 3, 2020, for the
22 entire State of Georgia was defective. That was the
23 information that the Secretary of State circulated.

24 Then on Saturday morning, we alerted Mr. Tyson as to
25 the nature of the problems that the scanner was not tabulating

1 correctly. He did not respond to that. That was Mr. Cross'
2 email attached to our submission.

3 Then Mr. Cross emailed him again asking for a
4 response. Then I emailed last night another question saying
5 that the problem that we discovered is different than the
6 problem that you reported to the press. What is the nature of
7 it?

8 So we have given them, in addition to our filing with
9 the Court, three separate opportunities to inform the
10 plaintiffs as to the nature of these problems. We are not
11 making a mountain out of a mole hill. There are three
12 mountains out there.

13 They described one very inadequately, and there are
14 two other problems. The third problem we found out from one of
15 the counties, Irwin County, in response to our Open Records Act
16 request. Said no, no, it is not a big deal. It wasn't either
17 one of the problems that we knew about. It is, in fact, a
18 third problem. And that was with write-in candidates wasn't
19 working.

20 And so what we have is we have three problems. One
21 they have disclosed. Now -- and it is not de minimis. If it
22 is de minimis, it still needs to get certified. The EAC still
23 needs to bless it as a de minimis change. It is highly unusual
24 to have a software change on the eve of an election.

25 But, moreover, we have no explanation, despite giving

1 the Secretary the opportunity over the entire weekend, to come
2 up with some response to our questions. What is going on with
3 these -- with the scanner not reading at all for the November 3
4 election? Just to be clear, you feed a November 3 ballot into
5 the scanner and it doesn't read it using the current database.

6 Given that information and given --

7 THE COURT: And which one is this? Of the
8 submissions you-all sent in, which one? Because you have A
9 through G, I think.

10 MR. BROWN: That is described in -- in my email,
11 which is B, and then also in Mr. Cross' email, which is, I
12 think, D.

13 MR. TYSON: Your Honor, this is Bryan Tyson. I would
14 like to respond obviously when Mr. Brown is finished.

15 MR. BROWN: And so we have been -- Your Honor, we
16 have done what we could to try to get some answers prior to
17 this. And they have no answers even though they have had since
18 Saturday. And in addition, the counties themselves that
19 experienced these problems each notified the Secretary.

20 This isn't the ballot-flipping-two-column problem
21 that they told the press and they have been talking about this
22 morning. These are separate problems with the database.

23 THE COURT: Where does this -- where was the scanner
24 problem when you say --

25 MR. BROWN: It was in Cherokee County. It was in

1 Cherokee County, Your Honor. We discovered it, Your Honor,
2 because we have an incomplete discovery request to Cherokee
3 County to inspect their scanner.

4 And so we were -- Mr. Ichter was trying to make the
5 arrangements for us to go up there on Tuesday to inspect the
6 scanner. Counsel for Cherokee County has confirmed multiple
7 times that, okay, you can come on out on Tuesday, but the
8 database doesn't work, it won't read the ballots.

9 So when we learned that on Friday, we were, of
10 course, alarmed. And then almost immediately, we got Chris
11 Harvey's email to all 159 counties saying that the database
12 wasn't working.

13 So we asked Bryan Tyson, what is up with this, and
14 got no response and then get blasted this morning for making a
15 mountain out of a mole hill.

16 MR. CROSS: Your Honor, this is David Cross. If I
17 could further respond with two quick points. One, just picking
18 up on the last piece about Irwin County, part of the concern
19 here is there looks to be a dramatic disconnect between what
20 the State is telling us and what is being conveyed to the
21 county. So this is Exhibit E where --

22 THE COURT: What did you say? D or E?

23 MR. CROSS: E. E as in echo.

24 THE COURT: All right.

25 MR. CROSS: So if you have that, Your Honor, it is a

1 short email from Irwin County -- Ken Collins from Irwin County
2 elections. And the Coalition had folks reach out to counties
3 to figure out what we could about this since we couldn't get a
4 response from the State.

5 And here you have Irwin County taking a very
6 different position than you have heard from the State where
7 Irwin County says the very issue that was the subject of the
8 filing, Mr. Harvey's email -- they are saying this is the third
9 flaw that Mr. Brown noted where they are saying they are the
10 ones who have identified it as just a minor glitch. They
11 caught it in their L&A testing. It has to do with the write-in
12 candidate.

13 So this raises a serious concern of what the counties
14 even understand is the problem and what they are supposed to
15 do. You will see in two of the other exhibits that we filed at
16 least one or maybe two of the counties have indicated they are
17 moving forward with L&A testing even on the current database
18 and equipment.

19 And so it is -- I'll get to the second point in a
20 moment. It is -- but I just want to say it is frustrating to
21 get blasted, as Mr. Brown put it, on this call, that we have
22 tried our best to get to the bottom of this and there is a lot
23 of different information coming out from counties versus the
24 State.

25 So it does not look to be de minimis at all as the

1 way Mr. Tyson began. And that gets to the second point. What
2 we just heard is that they are making a software change to the
3 BMDs. That is what was represented to this Court. That is not
4 at all a de minimus change.

5 Remember what Mr. Tyson said during the hearing?
6 These were his words. The election is already underway. That
7 was a key theme for them. Not we are on the cusp of it. It is
8 underway.

9 They are telling Your Honor that in the midst of an
10 election they are changing the software to the BMD. That is an
11 enormous -- just put aside for the moment the vector that
12 creates as a penetration point for malware.

13 But where is the EAC certification for that? What is
14 the extent of that change? How do we know what security
15 measures have been taken? They are apparently going to ship
16 USB drives to 159 counties coming from we don't even know. It
17 sounds like maybe Dominion. What security measures are on
18 those? Are those just going through UPS or FedEx?

19 I mean, this -- this is -- this is a mountain. It is
20 not a mole hill. And what we have heard this morning is only
21 making it a greater concern.

22 MR. TYSON: Your Honor, this is Bryan Tyson. What we
23 have just heard is a disinformation campaign about Georgia
24 elections. Let me walk through these issues here one at a
25 time.

1 THE COURT: All right.

2 MR. CROSS: Your Honor, I'm sorry. That is just --
3 that is totally inappropriate.

4 THE COURT: All right. All right.

5 **(Unintelligible cross-talk)**

6 MR. CROSS: I'm sorry. I need to respond to that.
7 That is inappropriate. These are the facts. No one on our
8 side is (unintelligible).

9 MR. BROWN: Your Honor, we have taken enough of this.
10 We have been called Luddites for two years now. And --

11 THE COURT: All right. I understand. There is
12 hot -- there is a great deal of concern on all parties', all
13 counsel's part. And I don't think it is helpful to -- at this
14 point to make this more vitriolic or electric than it needs to
15 be.

16 That is what I was trying to say before, Mr. Tyson,
17 you basically plunged in is that I think I need to read the
18 correspondence that was sent. It is all very short. But I'm
19 going to have to take two or three minutes to read what was
20 sent back and forth.

21 And I do want to know though what was -- you know,
22 was there -- again, trying to wrap up the one matter we were
23 discussing, where was it identified in L&A testing? What
24 county, or was it in the lab, or where was it?

25 MR. TYSON: Your Honor, it was -- this is Bryan

1 Tyson. It was Richmond -- or Douglas County and Richmond
2 County. And the county L&A testing is where it was identified.

3 THE COURT: Thank you. All right. I'm going to --
4 I'm just going to go on mute while I read this. All right.
5 And I will be back.

6 And I would appreciate if people didn't talk during
7 that period of time. Thank you.

8 **(A brief break was taken at 11:49 A.M)**

9 THE COURT: All right. I'm ready to reconnect.

10 Just before you plow in, Mr. Tyson, Mr. Harvey's --
11 can you hear me, first of all?

12 MR. TYSON: Yes. Yes, Your Honor, we can. And I
13 believe --

14 THE COURT: All right. Mr. Harvey's email to the
15 election offices around the State indicated that the database
16 would have to be rebuilt.

17 So what was that in response to then?

18 MR. TYSON: Your Honor, this is Bryan Tyson. And I
19 believe Dr. Coomer and Mr. Sterling -- I thought they had
20 covered this. They may not have.

21 But the original thought was that a change to the
22 database would be required. And then we were able to locate a
23 better fix, which was a simpler fix that would not require
24 rebuilding the database.

25 And so that is why the original email indicated that

1 was the approach they were thinking of taking. We have found a
2 better way to do it and are taking that measure instead.

3 THE COURT: When did you first have notice of it? I
4 mean, you may have covered this. But I'm just trying to figure
5 out why at 4:10 this occurred.

6 And was it directly to you, or was it -- I assume
7 that the department contacted Dr. Coomer.

8 MR. TYSON: Your Honor, the counties first notified
9 the Secretary's office on Thursday evening, I believe, and the
10 work began on Friday.

11 The thinking behind Mr. Harvey's email was we didn't
12 want to have counties working unnecessarily on logic and
13 accuracy testing if they would have to just redo it again. And
14 so thus the reason for the pause and then picking it back up
15 hopefully this week to make that process move forward.

16 The Secretary's office handled the interactions with
17 Dominion. Counsel was -- we were made aware of it on, I guess,
18 Saturday when we discussed it with the Secretary's office.

19 MR. STERLING: I can speak -- this is Gabriel again.
20 I can speak to one slight difference. We got informed at the
21 Secretary's office, I think, around lunchtime or so, if memory
22 serves, on Thursday. And Thursday night, Dominion called me
23 and said that they had discovered what the actual problem was.

24 And on Friday, we were talking about what to do. And
25 we said why let the counties spend time, money, and effort on

1 doing L&A if we're going to have to do it again. At the time
2 we thought we were still going to be doing a database rebuild.

3 I believe on Saturday we were offered a couple of
4 options. One was a database rebuild, but we would not have
5 been able to do the two columns, which was the decision on the
6 ballot style, that we would have to do a single column with
7 pagination or scrolling.

8 And the other one was the fix that we are going with
9 that will allow both columns to appear so it is fairer to the
10 candidates and easier for the voters. So that is why that
11 decision was made.

12 THE COURT: All right. Mr. Tyson, you wanted to
13 respond?

14 MR. TYSON: Yes, Your Honor. I just wanted to cover
15 the other issues Mr. Brown raised.

16 He mentioned a problem with the central count
17 scanners from Cherokee County. The issues that have been
18 raised by Cherokee County relate to what we discussed
19 extensively during the hearing that the AuditMark does not
20 contain whether or not the vote was flagged as ambiguous for
21 those stray marks on ballots.

22 The Cherokee County folks apparently misunderstood
23 that and believed that the AuditMark -- when it said no vote
24 was recorded, that was the end of the story. Where in reality
25 the only issue there was they did not look at the adjudication

1 software to see whether it was flagged as ambiguous.

2 So there are no issues for scanning on anything else
3 there. That is the sole issue that we covered extensively at
4 the hearing.

5 The Ben Hill issue or the Irwin County issue on
6 write-ins apparently has to do with a candidate -- presidential
7 write-in candidate who has a number in his name. And the BMD
8 has a -- just only letters on the keyboard. So that is not a
9 defect or a fault. That is just, you know, you don't -- you
10 enter information about the write-in so that the election
11 officials can determine what that is.

12 So, again, that is the entirety of these issues. And
13 when we are getting the emails over the weekend from
14 plaintiffs' counsel, it is responding to a filing that includes
15 -- said that we likely intentionally were sitting on this
16 information. But also we were in a scenario where we by Sunday
17 had a call scheduled with the Court.

18 We were trying to determine what was actually
19 happening, discovered these are really nonissues at all or
20 easily fixed, and did not see any basis to conduct discovery by
21 email, especially considering with this case we have a history
22 of emails between counsel being waved around as admissions and
23 various other things.

24 We can deal with this in the normal course of
25 discovery, and these are not issues that require any sort of

1 emergency resolution or change to our status. The BMDs are
2 working. We have identified the issues through normal testing.
3 We are -- the issue is being addressed through a very simple
4 change. It will allow voters to see all Senate candidates on a
5 single screen, which is best for everyone. And we can proceed
6 with the November election.

7 And the last point I'll make is: Mr. Cross
8 referenced the issue we raised about the election is underway.
9 That is correct. The absentee portion of the election is well
10 underway. Over a million people have already had absentee
11 ballots go out from the State and counties to them.

12 The election is underway. The poll worker training
13 is underway. But election operations for the BMDs
14 themselves -- this is a process that we have to go through.
15 The issues with the election being underway relate to absentee
16 processing, printing, poll worker training, all those issues.

17 The programming of the BMDs can continue on its
18 course, as Mr. Sterling discussed, even with this minor change
19 that addresses the underlying issues. So the election is
20 absolutely underway. But there is also time to continue the
21 programming of the ballot-marking devices and make this
22 November election a success that all Georgians could have
23 confidence in when we finish counting the votes.

24 MR. CROSS: Your Honor, this is David Cross to
25 respond to a couple of points. One, we still haven't gotten an

1 answer on what exactly they are doing. They have said they are
2 reprogramming the BMDs. They are making a change to the
3 software. There is no indication as to what that is exactly or
4 whether the EAC has approved it, whether they have gone before
5 the EAC.

6 THE COURT: Well, they haven't had -- they have
7 said -- I mean, I'm going to follow up and find out what
8 happens after the independent laboratory reviews this and where
9 it goes then.

10 But they have said what they are doing. They
11 submitted -- they are submitting it to the lab or they did it
12 last night, and they are expecting something -- basically a --
13 that they will be conducting a laboratory test and making --
14 that is the question.

15 What happens at that point? But they were
16 anticipating approval by Wednesday.

17 MR. CROSS: Is that approval from -- sorry, Your
18 Honor -- approval from the EAC or from the independent lab from
19 Pro V&V? Because that is --

20 **(Unintelligible cross-talk)**

21 THE COURT: Let's just deal with -- Dr. Coomer, what
22 was the anticipation so that I'm not just jumping to
23 conclusions?

24 DR. COOMER: Yes, Your Honor. This is Dr. Coomer.
25 So the testing lab has already deemed the change de minimis.

1 So I have to -- I have to be careful here because, you know, I
2 don't have the exact statute and regs at my fingertips.

3 But there is a process within the EAC for rapid
4 approval of de minimis software changes. So that is the
5 framework on which we are operating. And it is my
6 understanding that that approval can be granted as quickly as,
7 you know, the next day or two.

8 THE COURT: So when did the testing occur even if
9 they viewed it as de minimis? They are just viewing it as --
10 the lab, Pro V& -- and whatever the last -- other initial is --
11 they are viewing it as de minimis, but they already did testing
12 on it?

13 DR. COOMER: Your Honor, this is Dr. Coomer again.
14 So the first step is they analyze the code change to determine
15 whether it is de minimis or not. And then that -- then if it
16 is de minimis, then they follow the testing steps around that
17 process.

18 THE COURT: And they told you that --

19 DR. COOMER: I'm sorry. That is what they are doing
20 today.

21 THE COURT: That is what they are doing today. All
22 right.

23 DR. COOMER: Yes.

24 MR. TYSON: Your Honor, this is Bryan Tyson. One
25 other point I think is relevant here is that while the statute

1 requires Georgia to procure a system that is EAC certified,
2 which they did, the statute does not specifically require that
3 Georgia's system has to -- we can only use an EAC certified
4 system. So if necessary, the Secretary can certify the system
5 and we can proceed with its use even if we're still waiting on
6 the EAC certification because the system was EAC certified when
7 we obtained it.

8 MR. CROSS: Your Honor, this is David Cross. That is
9 a troubling position to take. For the purpose --

10 THE COURT: All right. I understand what your
11 position would be. I don't mean to --

12 I'm sorry. Something is going wrong with the audio.

13 **(There was a brief pause in the proceedings.)**

14 THE COURT: I'm sorry. You went -- whoever was
15 speaking went on to some peculiar channel of audio. We could
16 not hear it clearly.

17 MR. ICHTER: Your Honor, this is Cary Ichter. May I
18 make a comment, please?

19 THE COURT: Well, was somebody speaking just now?
20 Because I couldn't understand a word of it if they were.

21 MR. ICHTER: Your Honor, this is Cary Ichter. I just
22 asked if I could make a comment.

23 THE COURT: Yes, you can make a comment. I'm just
24 saying before you just said, could I make a comment,
25 Mr. Ichter, somebody was speaking.

1 Who was speaking before you?

2 MR. ICHTER: I'm not sure.

3 COURTROOM DEPUTY CLERK: Judge, that was someone
4 identified as Sara Nelson on the thing. So I muted them.

5 THE COURT: Okay. Thank you very much for the
6 clarification.

7 MR. ICHTER: Your Honor, as Mr. Brown mentioned, this
8 all began Friday late evening as a consequence of a
9 conversation I was having with counsel for Cherokee County
10 where we found out about the notice from the Secretary's office
11 about the defect in the database. And as a consequence of
12 that, the papers that we filed got filed.

13 That conversation I was having with counsel was a
14 consequence of the subpoena that we had issued to go out and
15 observe the logic and accuracy testing, which was supposed to
16 occur on this Tuesday.

17 And since that was being suspended and we were told
18 that we were no longer going to go out and observe that, we
19 asked that we be allowed to come out and take a look at what
20 was going on with the scanners, which was the second problem
21 that Mr. Brown identified that the State's counsel didn't
22 mention during the course of his argument.

23 And we intend to do that tomorrow with the
24 cooperation of counsel for Cherokee County. And that is
25 scheduled for tomorrow. And if Cherokee County is having

1 problems with the scanner and it has been explained to them
2 what the problem is and how they resolve it and it is
3 purportedly not a problem, then they don't seem to appreciate
4 that. Because when I spoke to counsel for Cherokee County this
5 morning, I was advised that when we come out there to look at
6 the scanner and see how it is operating tomorrow, we would
7 learn that it is not operating in the manner in which it is
8 supposed to.

9 And what I would propose is that we do that
10 tomorrow -- I believe it is at 10:00 A.M. -- and that we circle
11 back to the Court and report to the Court on our findings with
12 respect to what is happening in Cherokee County.

13 MR. TYSON: Your Honor, this is --

14 THE COURT: Wait. Is the scanner at all connected to
15 this presidential candidate who -- this candidate who has an
16 actual number in his name or her name?

17 MR. ICHTER: No, not as far as I am aware, Your
18 Honor. I'm sorry. That was Cary Ichter.

19 THE COURT: So the problem with the scanner is
20 precisely what that you have reported?

21 MR. ICHTER: As it has been described to us -- and we
22 have not personally observed it. But as it has been described
23 to us is that when the ballots are scanned in they are
24 tabulating nothing.

25 MR. TYSON: Your Honor, this is Bryan Tyson. I

1 believe I covered this, that the issue from Cherokee County is
2 stray marks that are showing as no vote on the AuditMark but
3 were not viewed using the adjudication software.

4 Again, we're kind of -- now we have hearsay within
5 hearsay from Mr. Ichter about what somebody told him about what
6 they thought was happening. I'm kind of at a loss as to what
7 we are doing.

8 MR. ICHTER: I guess, Mr. Tyson, my question would
9 be: What is the source of your information that that is
10 Cherokee County's problem?

11 MR. TYSON: This is Bryan Tyson. Cherokee County had
12 sent some information to the Secretary's office. And only
13 since ballots with audit marks questioning why certain stray
14 marks were showing as no vote on the AuditMark -- that is the
15 exact issue we discussed with Dr. Coomer during the hearing,
16 that there is metadata that those could be flagged as ambiguous
17 or not or they could be outside the target area.

18 That doesn't mean that the scanner is not working
19 properly or has a defect, as Mr. Ichter has said, which there
20 is no evidence of a defect. We have already discussed at
21 length the issue with the display.

22 MR. BROWN: This is Bruce Brown. I just want to
23 focus in on one thing. And that is that the Secretary of State
24 is basing its diagnosis of the problems in Cherokee upon what
25 Cherokee sent to the Secretary of State and not upon any other

1 initiative that it has taken to determine what the problems
2 with Cherokee -- that Cherokee is having.

3 Is that correct, Mr. Tyson?

4 MR. TYSON: I'm at a loss, Bruce. I'm sorry. The
5 ballots that were filled out properly the votes show as clearly
6 counted. The stray marks show there was nothing there.

7 MR. BROWN: Are you talking about the votes from
8 Cherokee -- are you talking about -- are you talking about just
9 sort of in the abstract or the information that you received
10 from Cherokee County?

11 MR. TYSON: The information the Secretary's office
12 received from Cherokee County, which beyond Mr. Ichter's
13 statement in the hearing right now, is the only information we
14 have about any alleged issues with Cherokee County.

15 THE COURT: All right. The only thing -- Counsel, I
16 mean, I can understand what the dispute is. But I want to just
17 know one thing, which is if this -- are we talking about
18 something that has arisen in connection with logic and accuracy
19 testing there? I mean, is that of the absentee ballot then
20 we're talking about? Because we're talking about stray
21 ballots -- stray marks. Or are we talking about --

22 MR. BROWN: Yes, Your Honor.

23 THE COURT: -- on the BMD itself?

24 MR. BROWN: What my understanding is -- and
25 Mr. Ichter can weigh in if this is wrong. My understanding is

1 that in anticipation of the Coalition plaintiffs' visit to
2 Cherokee County scheduled for Tuesday, still scheduled for
3 tomorrow, Cherokee County tested their -- started their own
4 logic and accuracy testing so that they could assure themselves
5 that what they were setting up for the Rule 34 inspection would
6 work. They did so, and it didn't work.

7 And the description that Mr. Tyson gives sort of as
8 an abstract matter relating back to the hearing is totally
9 different from what we received from Cherokee.

10 And the Cherokee people are very good. They know
11 what they are doing. And they spotted this problem and could
12 not get it to work. And then we alerted Mr. Tyson of this
13 problem.

14 THE COURT: All right.

15 MR. BROWN: And there was crickets all weekend.

16 THE COURT: Well, you know, it is also the weekend.
17 But -- all right. I think I understand. Of course, I don't
18 know what really is happening in Cherokee County myself. And
19 I'm not going to be able to get to the bottom of that now.

20 But -- and the only thing about it is that to the
21 extent that they are testing -- which I gather absentee ballots
22 on the -- that might -- or paper ballots that have been scanned
23 on the -- and tabulated and these are paper ballots that
24 individuals filled with their own handwriting -- that is a
25 question I did want to follow up on separately.

1 But I'm not going to even get to that until I let
2 Mr. Tyson say what he wanted to say. I mean, he was telling me
3 at the point that everyone jumped that it was -- basically that
4 the State didn't need certification of the EAC in order to
5 proceed as long as the machine has been -- the whole package
6 had already been certified before and it was only a
7 modification.

8 I understood as a matter perhaps of law that that is
9 something else. And people -- I mean, I think at that point
10 also Mr. Cross had started saying it is very troubling, it is
11 very significant. I understood that point too.

12 But I don't think there is more to be said about that
13 other than really, you know, yes, the EAC can take more time
14 and maybe it won't (unintelligible) exactly that way.

15 But I'm going to presume that there is going to be
16 more testing of it in other counties again with the same issue.
17 At this juncture, though, as I understand it, just in terms of
18 the facts in front of the Court, is that there -- that the
19 State is not at this juncture contemplating rebuilding the
20 databases or is it?

21 MR. TYSON: Your Honor, this is Bryan Tyson. That's
22 correct. The State is not rebuilding the databases. We are
23 making the de minimis software change that Dr. Coomer has
24 outlined. And that addresses the entirety of the issues with
25 the display of the two columns in the U.S. Senate race.

1 THE COURT: Now, if, in fact, there is an issue, for
2 instance, out of Cherokee or another county with the tabulator,
3 you would have to -- that would be something else; right? That
4 would go -- that would have to be promptly reported; right?

5 MR. TYSON: Yes, Your Honor. This is Bryan Tyson
6 again. That is correct.

7 And if there was some widespread issue, we would
8 expect to see it in a number of counties. No other county has
9 reported similar questions around the scanners as to what
10 Cherokee has. And that is why, again, we believe it is just
11 the issue of the AuditMark versus the adjudication as opposed
12 to -- and the stray marks.

13 And, again, as you correctly identified, it only
14 relates to hand-marked absentee ballots -- the scanner issues
15 Mr. Brown was discussing. It has nothing to do with BMD-marked
16 ballots. And that is to the extent it is even an actual issue,
17 which we don't at this point believe it is. But we will always
18 investigate if the county brings something to us.

19 THE COURT: Well, if absentee ballots are those
20 classified as that because -- or provisional ballots or
21 emergency ballots that are hand done; right?

22 MR. TYSON: Yes, Your Honor, except that the -- yes,
23 except that the emergency or provisional ballots -- the
24 provisional ballots would be counted on a central scanner. But
25 the emergency ballots would be counted on a precinct scanner,

1 not on a central count scanner.

2 And, again, all of the bubbles that were filled in
3 properly for Cherokee correctly registered on what
4 (unintelligible).

5 THE COURT: All that is assuming that the scanner
6 tabulator is working in a precinct but -- and that there is not
7 a power failure or anything else in terms of the emergency
8 ballot.

9 Let me ask you this because this is really something
10 that was a hanging chad from the last hearing -- and this is
11 really directed as much to Dr. Coomer as I don't -- I
12 understand that you indicated that the software -- in your
13 testing the software for the scanner would have to be modified
14 in order to have better resolution of the scanned image for
15 ballots that have to be adjudicated or being flagged for
16 adjudication.

17 And so if you had -- when you were at the point of
18 having to build -- potentially to rebuild the database, then
19 you would do it then? Or are you just talking -- why wouldn't
20 this be a minor adjustment -- just that type of adjustment be a
21 minor adjustment just -- you are saying this current one that
22 you are submitting at this moment is?

23 DR. COOMER: Your Honor, this is Dr. Coomer. So I
24 did cover this in my initial testimony. And we have to be very
25 clear here. There are two issues when people talk about

1 scanner resolution.

2 The first is the sensitivity settings for whether
3 what we call an ambiguous mark is ambiguous or we determine to
4 be a mark or not a mark. That requires no software change.
5 And those limits were changed by the State. And that required
6 no software change.

7 There were statements made about accuracy being
8 affected by the scanner resolution itself, the DPI, which there
9 is absolutely no basis for that statement. Whether a mark is
10 counted as ambiguous or not is wholly independent of the DPI
11 resolution.

12 THE COURT: I don't want to get into a debate, having
13 read your testimony about five times now about this. But you
14 indicated that anything that was done about this in order to
15 increase clarity would have to be done on the software and
16 therefore you couldn't do it.

17 DR. COOMER: For the DPI resolution, that is correct.
18 For the sensitivity threshold settings, that is -- that is
19 supported through the existing software. And those limits were
20 changed for this election.

21 THE COURT: And you could change them again?

22 DR. COOMER: Yes.

23 THE COURT: But --

24 DR. COOMER: But that would require a whole new
25 database.

1 THE COURT: A whole new database just to change the
2 -- you just said you could -- in order to change the -- you
3 went down from 12 to 10. You are saying it would have to --
4 you would have to have a whole -- use a whole new database just
5 so you could change --

6 DR. COOMER: Sorry if I wasn't clear. We didn't need
7 to change software. But those settings are part of the machine
8 files that are created during database setup. So it would
9 require all new database to change those limits.

10 THE COURT: So when you were changing -- I mean, you
11 had an emergency rule that was passed two weeks ago, I think
12 while we were having the hearing. And you are saying you did
13 it right then, or you did it beforehand?

14 DR. COOMER: No. We did it when that rule -- I
15 believe we did it when that rule came in. We might have done
16 it prior to that in anticipation. I would have to verify on
17 the exact date we made that change. But it was before the
18 database was finalized and delivered to all of the counties.

19 THE COURT: So when was it, Mr. Sterling, finalized
20 and -- when did you distribute the database to the county?

21 MR. STERLING: Off the top of my head, I don't know.
22 I'll get that answer to you.

23 THE COURT: How many counties have actually done --
24 the logic and accuracy testing has been completed?

25 MR. STERLING: Before this -- well, nobody has now

1 because, as we said, with this new software change, they are
2 going to have to start over again. We had 77 counties, I
3 believe, that had begun the process of doing L&A testing.

4 THE COURT: All right. All right. I'm going to take
5 a break and just see whether I have any other questions. And
6 it will be about two minutes. All right?

7 MR. CROSS: Your Honor, this is David Cross. Could I
8 ask one clarifying question?

9 THE COURT: Yes. Go ahead.

10 MR. CROSS: Just -- all right. So do I understand
11 correctly that the software change that is proposed for the BMD
12 will not require a new database? So that software could be
13 changed, but they won't require a new database for the
14 counties?

15 MR. TYSON: Your Honor, this is Bryan Tyson.

16 THE COURT: Let Dr. Coomer respond at this point.
17 All right?

18 DR. COOMER: Yeah. This is Dr. Coomer. That is
19 correct. This de minimis software change does not require any
20 database change in project settings.

21 MR. CROSS: Thanks, Doctor.

22 THE COURT: All right. I'm going to take a few
23 minutes. I think it is 12:22. Let's try to pick up at 12:25.
24 Thank you.

25 **(A brief break was taken at 12:22 P.M.)**

1 THE COURT: Okay. Dr. Coomer, let me just make sure
2 I understand one of the things you said is that, all right, you
3 have to have the new -- you have to basically build the new
4 database, which is all the instructions relating to the ballot
5 and the completion of the ballot, I assume, and other -- and
6 the coordinates and how to -- the adjudication software, what
7 it is recognizing and what the thresholds are.

8 But all of that is loaded into what you call the
9 database and is loaded into the ICX and then separately into
10 the scanner or not?

11 DR. COOMER: Yes. This is Dr. Coomer. Yes. Each
12 device has its own set of election files. So, for instance,
13 the ICX, because it is a ballot-marking device and it is not
14 scanning anything, knows nothing about threshold settings on
15 the tabulator.

16 The tabulator as it is scanning ballots needs to
17 understand what those threshold limits are. So that
18 information is included in those files. All of the files come
19 from a single database.

20 THE COURT: And when you send the database, are you
21 sending -- I'm just trying to make sure I understand. You are
22 putting that on a thumb drive. You did this earlier. You are
23 putting it on a thumb drive.

24 And it is just one that you are putting on the same
25 thumb drive that you are basically going to use for each of the

1 devices, or do you have a different one for each of the
2 devices?

3 DR. COOMER: So for the main back-end system, which
4 is the election database and that is used for defining all of
5 the machines and all of the election content, that is a single
6 file that is, you know -- that resides on the county's
7 equipment. From there, you create individual machine files
8 that then you use to program all of the different machines.

9 Is that clear?

10 THE COURT: I'm sorry. You provided one to the
11 county elections office as a whole and from there -- you broke
12 up in part.

13 DR. COOMER: Yeah. From there, the counties then
14 create individual election files for each of the devices and
15 use their process for loading those on to machines.

16 THE COURT: All right. And their process would
17 include -- is that an internet context?

18 DR. COOMER: No. Everything is loaded on through,
19 you know, secure removable media, whether it is a USB or a
20 compact flash, depending on the device.

21 THE COURT: All right. Thank you very much.

22 DR. COOMER: You are welcome.

23 THE COURT: And to your knowledge, that has already
24 been done?

25 DR. COOMER: That's correct. That's correct. And,

1 again, the State can provide a little more detail on that.

2 MR. STERLING: Judge Totenberg, this is Gabriel
3 Sterling again. We finalized that process a couple of weeks
4 ago. The last database files were sent out on 9/16. I just
5 got that confirmed while you were on your break.

6 THE COURT: Are there any other questions at this
7 juncture from defense counsel that are questions?

8 MR. TYSON: Not for the State defendants, Your Honor.
9 This is Bryan Tyson.

10 MR. CROSS: Your Honor, this is David Cross. I did
11 have a question if I could.

12 The new software that is going out and the USB drives
13 that will carry it, is there any security testing undertaken
14 for that software and for the drives?

15 THE COURT: Is that for Mr. Sterling?

16 MR. CROSS: This is for Mr. Sterling or Dr. Coomer,
17 whoever might know the answer.

18 MR. TYSON: Your Honor, Bryan Tyson for the
19 defendants. I just object on the basis we're not
20 cross-examining the witnesses. But I understand you would like
21 to know the answer. So --

22 MR. STERLING: This is Mr. Sterling. These are done
23 with fresh drives, as we have done databases under the
24 protocols we followed for several years. That is how it is
25 done. That is how we'll continue to do it.

1 THE COURT: Mr. Sterling, you are saying that they
2 are fresh drives?

3 MR. STERLING: Yes, Your Honor. Yes, Your Honor.

4 THE COURT: There is some evidence inconsistent with
5 that. But I'm glad -- that is the objective, in your mind?

6 MR. STERLING: Yes, Your Honor.

7 MR. CROSS: Your Honor, just back to my question, is
8 there security testing of the software and the drives, or is it
9 just aiming to get --

10 MR. STERLING: There is security testing on the
11 software, yes.

12 MR. CROSS: If we could get an explanation for what
13 that is and who is doing it.

14 MR. TYSON: Your Honor, this is Bryan Tyson. Again,
15 I'll object. We are way far afield. But --

16 THE COURT: I think, you know -- I'm not sure it is
17 going to be helpful at this point. I mean, I'm just trying to,
18 frankly, reconcile this with the document that was put out by
19 the CES division saying that they could use any -- they could
20 use their own thumb drives in order to update something. That
21 is what --

22 MR. STERLING: Judge, I was referring to the drives
23 that the State sends out for them to load to their EMSs. I was
24 asked how the State was done, and that is what I am answering.

25 MR. CROSS: Your Honor, if I may, this is David

1 Cross. The reason why, just as a factual matter, the security
2 is important and why we did want to understand a little better
3 is it sounds like the only one that has done any testing is Pro
4 V&V. And you'll recall that as Mr. Cobb pointed out they don't
5 do security testing. And, in fact, they have never tested the
6 existing software that is used in Georgia. They tested a
7 different version.

8 And so we just have -- it is a factual concern of
9 when they say Pro V&V has done -- this is a de minimis change.
10 You are looking at a lab that has never actually tested the
11 software that is used in Georgia to make that determination.
12 And then they are not doing security testing.

13 And so among all the things we have heard, the
14 software change is the most concerning. It is not what we
15 actually felt was happening coming in today. We thought it was
16 a database change, which had its own concerns. But this is far
17 bigger than we originally thought.

18 So I just want to make sure we are all clear on the
19 facts. Because it sounds like there are going to be 159 or so
20 USB drives with new software for BMDs shipped across the state
21 by some means, some unspecified security testing -- we don't
22 know who that is or what that is. But it can't be Pro V&V
23 because that is not what they do -- just a few weeks before a
24 presidential election.

25 THE COURT: All right.

1 MR. CROSS: It is hard to imagine a more concerning
2 scenario. That is it. That is all I have, Your Honor.

3 THE COURT: Mr. Sterling, go ahead and respond to the
4 question if you --

5 MR. STERLING: I'm frankly confused as to what the
6 question actually is. Pro V&V does some security testing. The
7 individual, who I believe was testifying before, Jack -- I
8 can't remember his last name -- does not do security testing.
9 But, again, we feel comfortable and confident in our systems.

10 THE COURT: All right.

11 MR. TYSON: Your Honor, this is --

12 THE COURT: Yes. Go ahead.

13 MR. TYSON: I'm sorry, Your Honor. This is Bryan
14 Tyson. I just wanted to be clear that what Mr. Cobb -- as
15 Mr. Sterling said, Mr. Cobb's testimony was he did not
16 personally do security testing. He does have someone who does.
17 So I don't want that to be left with the impression that Pro
18 V&V does not do security testing because they do.

19 MR. CROSS: That is actually not what he said
20 originally, Your Honor. But you have it. Pro V&V has never
21 done security testing on the election systems. That is in his
22 sworn declaration.

23 Again, I don't want to get bogged down. The only
24 point was there is new software coming out. We don't really
25 understand -- there does not seem to be security testing by any

1 independent security testers or what that looks like, just so
2 we're clear on that.

3 THE COURT: All right. If I understand, I'm --
4 really at this juncture why I just turned to Mr. Sterling is
5 you are relying on that Pro V&V is doing the testing?

6 MR. STERLING: Again, I'm loathe to answer this right
7 now and talk about security in a public forum about how we do
8 and what we do.

9 So I feel confident in our systems. They will be
10 secure.

11 THE COURT: All right. We'll just --

12 MR. BROWN: Your Honor --

13 THE COURT: Let's do this not in the public section
14 of this. And I mean, I'm not going to go into this in great
15 detail. But I don't want to sort of put Mr. Sterling in a
16 difficult position either.

17 And I'll deal with all follow-up we have, if we have
18 anything else that is hanging, in a private session. I just
19 would like to get some clarification.

20 But I am confident that if there is something that is
21 an issue on the Cherokee or the other county that it will be
22 raised. So I don't know that I need to create a feature for
23 that other than I would like not to have emergency hearings, if
24 at all possible.

25 And I do want to say that I had planned to issue a --

1 just for anyone who is present who is not going to obviously be
2 present in the next -- I had planned to issue sort of an
3 omnibus order today before all this arose. In order to get the
4 order out that has -- that is time-sensitive -- more
5 time-sensitive relating to the pollbooks, I basically took
6 what -- last night when it became clear what was going on, I
7 divided the order and assembled it so that the part of the
8 order that deals with provisions as to the pollbook and getting
9 it out are -- will be issued separately and will also be issued
10 ultimately as part of the order issued on the rest of the
11 order.

12 But I didn't want to wait any longer. And it was --
13 the order as a whole was a significant undertaking. So I know
14 that Ms. Cole has a conflict at the moment. So when she
15 returns to her home, we'll be able to get out the order. But
16 we will get it out this afternoon in order not to hold up the
17 relief any further or your being able to know where I'm at on
18 that. Everything is a narrow issue -- very narrow issue that
19 it addresses.

20 And I just wanted to make that clear. And it is just
21 sort of a change in course in the way we are dealing with it
22 that was just a function of the circumstances.

23 Mr. Martin, should we generate a different number to
24 call back in so that you don't have to -- don't have to deal
25 with anybody not understanding and getting on the phone?

1 COURTROOM DEPUTY CLERK: Are you talking about going
2 private with attorneys only?

3 THE COURT: That is right.

4 COURTROOM DEPUTY CLERK: Yeah. I guess we could use
5 the number that we've used before.

6 THE COURT: All right. Do you want to just send that
7 to everybody?

8 COURTROOM DEPUTY CLERK: Yes, ma'am, I will.

9 THE COURT: The only thing is that -- yes. Anyone
10 who is -- I guess Dr. Coomer should just -- should dial in as
11 well though. But they know how to get to whoever they need.

12 All right. Thank you. Then we're going to adjourn
13 the public proceeding. Thank you very much, everyone.

14 **(The public proceedings were thereby concluded**
15 **at 12:39 P.M., and all authorized parties**
16 **continued with a private telephone conference,**
17 **as follows:)**

18 THE COURT: [REDACTED]

19 [REDACTED]

20 DR. HALDERMAN: [REDACTED]

21 [REDACTED]

22 THE COURT: [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

1 [REDACTED]
2 MR. CROSS: [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 THE COURT: [REDACTED]
7 MS. RINGER: [REDACTED]
8 THE COURT: [REDACTED]
9 MS. RINGER: [REDACTED]
10 [REDACTED]
11 THE COURT: [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 MR. BROWN: [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 THE COURT: [REDACTED]
18 [REDACTED]
19 MR. BROWN: [REDACTED]
20 THE COURT: [REDACTED]
21 MR. BROWN: [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 MR. CROSS: [REDACTED]
25 MR. BROWN: [REDACTED]

1 MR. CROSS: [REDACTED]
2 THE COURT: [REDACTED]
3 MR. BROWN: [REDACTED]
4 THE COURT: [REDACTED]
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7 MR. TYSON: [REDACTED]
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12 THE COURT: [REDACTED]
13 MR. TYSON: [REDACTED]
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MR. TYSON:

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MR. TYSON: [REDACTED]

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THE COURT: [REDACTED]

1 MR. TYSON: [REDACTED]
2 DR. COOMER: [REDACTED]
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9 THE COURT: [REDACTED]
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17 DR. COOMER: [REDACTED]
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MR. STERLING: [REDACTED]

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MR. CROSS: [REDACTED]

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MR. RUSSO: [REDACTED]

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MR. STERLING: [REDACTED]

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MR. RUSSO:

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MR. RUSSO:

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MR. RUSSO: [REDACTED]

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THE COURT: [REDACTED]

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DR. COOMER: [REDACTED]

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THE COURT: [REDACTED]

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MR. RUSSO: [REDACTED]

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THE COURT:

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MR. CROSS: [REDACTED]

THE COURT: [REDACTED]

(The proceedings were thereby concluded at 1:01
P.M.)

C E R T I F I C A T E

UNITED STATES OF AMERICA

NORTHERN DISTRICT OF GEORGIA

I, SHANNON R. WELCH, RMR, CRR, Official Court Reporter of the United States District Court, for the Northern District of Georgia, Atlanta Division, do hereby certify that the foregoing 71 pages constitute a true transcript of proceedings had before the said Court, held in the City of Atlanta, Georgia, in the matter therein stated.

In testimony whereof, I hereunto set my hand on this, the 28th day of September, 2020.

Shannon R. Welch

SHANNON R. WELCH, RMR, CRR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
OFFICIAL CERTIFIED TRANSCRIPT